



**U.S. Department of Justice**

*United States Attorney  
Eastern District of New York*

PAN:EMN  
F.#2007R00730

271 Cadman Plaza East  
Brooklyn, New York 11201

July 13, 2011

By ECF

Honorable Jack B. Weinstein  
United States District Court  
Eastern District of New York  
271 Cadman Plaza East  
Brooklyn, New York 11201

Re: United States v. Dominick Pizzonia  
Criminal Docket No. 05-425 (JBW)

Dear Judge Weinstein:

The government respectfully submits this letter in opposition to the defendant Dominick Pizzonia's motion filed pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure.

Background

On May 11, 2007, the defendant was found guilty by a jury of racketeering conspiracy, including predicate acts of murder conspiracy and illegal gambling, in violation of 18 U.S.C. § 1962(d). By judgment entered on October 2, 2007, the Court sentenced the defendant to 15 years' imprisonment, to be followed by three years of supervised release, and a \$100 special assessment. The defendant appealed his conviction to the United States Court of Appeals for the Second Circuit. Following the denial of his appeal, see United States v. Pizzonia, 577 F.3d 455 (2d Cir. 2009), the defendant filed a petition with the United States Supreme Court for a writ of certiorari, which was rejected, see Pizzonia v. United States, 130 S. Ct. 1088 (2010). The defendant is currently incarcerated at the Federal Medical Center in Butner, North Carolina.

On May 31, 2011 the defendant filed the instant pro se "Motion Pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure."<sup>1</sup> Citing "a significant change in . . . factual

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<sup>1</sup> The instant motion is the defendant's first post-conviction petition for relief of which the government is aware.

conditions," i.e., "his extraordinary medical condition that was present but unknown at sentencing," the defendant seeks resentencing. (Def. Mem. 2, 6). The defendant asserts that "there is a reasonable probability that he will require an organ transplant" and that "the BOP is unable to provide organ transplants to Pizzonia." (Id. at 4-5). The defendant also asserts that a shorter sentence is appropriate in light of certain provisions of the United States Sentencing Guidelines. (Id. at 4-6). The defendant seeks resentencing either to 81 months' imprisonment or to early release to home confinement "upon determination by a BOP employee doctor or BOP contract doctor that Pizzonia requires an organ transplant and that none is available while Pizzonia is in a BOP facility." (Id. at 6).

By order dated June 13, 2011, the Court directed the government to respond to the defendant's motion by July 13, 2011, affording the defendant the opportunity to reply by July 18, 2011, and scheduled a non-evidentiary hearing for July 27, 2011 at 10:00 a.m. (Docket Entry No. 274).

#### Discussion

Rule 60(b)(5) of the Federal Rules of Civil Procedure cannot provide the relief the defendant seeks. The rule applies only to civil matters and has no application in criminal cases. See Negron v. United States, 164 Fed. App'x. 158 (2d Cir. 2006) (upholding district court's dismissal of a pro se defendant's motion to vacate his conviction pursuant to Rule 60(b)(5) because "Rule 60(b) cannot afford Negron relief from his judgment of conviction in a criminal case").<sup>2</sup> Accordingly, the defendant's claim should be dismissed.

If the Court elects to do so, however, it may instead recharacterize the defendant's motion as having been brought pursuant 28 U.S.C. § 2255. See Castro v. United States, 540 U.S. 375 (2003). If it does so, the government respectfully requests that the Court first warn the defendant of the consequences of the recharacterization. Under Castro, "a district court may not recharacterize a pro se litigant's motion as a request for relief under § 2255 - unless the court first warns the pro se litigant about the consequences of the recharacterization, thereby giving the litigant the opportunity to contest the recharacterization." Id. at 377. See also Adams v. United States, 155 F.3d 582 (2d

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<sup>2</sup> Negron's motion was originally brought before this Court and denied by order dated May 9, 2005. See United States v. Negron, Criminal Docket No. 99-1044 (JBW), Docket Entry No. 327.

## Conclusion

<sup>3</sup> In the event the defendant's claim is recharacterized, it would still ultimately fail. "[C]laims of inadequate medical treatment are 'not cognizable in a federal habeas corpus proceeding.'" Ruiz v. United States, Criminal Docket No. 94-392 (LAP), 2000 WL 1029186, at \*1 (S.D.N.Y. July 24, 2000) (quoting United States v. Sisneros, 599 F.2d 946, 947 (10th Cir. 1979)). Moreover, the defendant's reliance on various Guideline departure provisions is inapposite, as (absent limited circumstances not present here) a departure cannot be granted following sentencing. See Kornegay v. Federal Bureau of Prisons, Civil Docket No. 07-3990 (ARR), 2007 WL 2907326 (E.D.N.Y. Oct. 4, 2007) (rejecting Section 2241 petition seeking reduction under court's departure authority on grounds of harsh conditions of confinement).